Supreme Court of the United States

OCTOBER TERM, 1938.

No. 57.

STATE OF MISSOURI EX REL. LLOYD L. GAINES, PETITIONER,

VS.

S. W. CANADA, REGISTRAR OF THE UNIVERSITY OF MISSOURI, AND THE CURATORS OF THE UNIVERSITY OF MISSOURI, RESPONDENTS.

PETITION OF THE RESPONDENTS FOR A REHEARING.

FRED L. WILLIAMS,
FRED L. ENGLISH,
NICK T. CAVE,
WILLIAM S. HOGSETT,
Counsel for Respondents.

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Come now the above-named respondents, S. W. Canada, registrar of the University of Missouri, and the curators of the University of Missouri, and present this, their petition for a rehearing of the above-entitled cause, and, in support thereof, respectfully show:

I.

The court's construction of the equal protection clause applied in this case is not in accord with prior interpretations of the clause by this court, and is erroneous.

In holding that the State of Missouri is bound to furnish Gaines equal facilities for legal education *within its own borders*, and cannot satisfy his constitutional right

to equal protection by furnishing such facilities in an adjacent state university, the court has construed and applied the equal protection clause of the fourteenth amendment in a manner not justified by its language, and not in accordance with the settled construction of the clause as heretofore applied by this Honorable Court.

The court holds that the question whether the provision for the legal education in other states of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection, is "the pivot upon which this case turns" (page 6 of printed opinion). The court then says that the relative advantages of legal education within and without the State are matters beside the point; that the validity of laws separating the races rests wholly upon the equality of privileges given to the separated groups *"within the State"* (page 6); that the State's obligation of equal protection "can be performed only where its laws operate, that is, *within its own jurisdiction*"; that "it is *there* that the equality of legal right *must be* maintained" (page 7); and that the State was bound to furnish Gaines equal facilities for legal education *"within its borders"* (page 8). The court concludes that Gaines was entitled to be admitted to the law school of the University of Missouri "in the absence of other and proper provision for his legal training *within the State*" (page 9).

The equal protection clause provides that no state shall "deny to any person *within its jurisdiction* the equal protection of the laws." The court in this case has construed the words "within its jurisdiction" to mean that the State of Missouri must provide legal instruction for Gaines *within its borders*, and may not satisfy his con-

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(All italics in quotations are ours.)

stitutional right to equal protection by contracting or arranging, at the State's expense, for his legal education in a nearby adjacent state university, regardless of the high quality of legal education there available to him.

This is a new interpretation of the equal protection clause, and one which (so far as our research discloses) has never before been applied by this Honorable Court. Heretofore the phrase "within its jurisdiction" has been interpreted merely as limiting the guaranty of equal protection of the laws to *persons who are physically within the territorial jurisdiction of the State.* The phrase has heretofore been construed as defining the *persons* to whom equal protection must be accorded, and has never before been construed as limiting *the territory within which* facilities accomplishing equal protection may be used. Decisions construing the phrase are as follows:

In *Blake* v. *McClung*, 172 U. S. 239, 260-1, the court said:

> "It is equally clear that the Virginia corporation cannot rely upon the clause declaring that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' *That prohibition manifestly relates only to the denial by the State of equal protection to persons 'within its jurisdiction.'* "

In *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417, the court said:

> "We, therefore, reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is, within the meaning of the fourteenth amendment, *a person within the jurisdiction* of the State of Alabama, and entitled to be protected against any statute of the state which deprives it of the equal protection of the laws."

In *Philadelphia Fire Ass'n* v. *New York*, 119 U. S. 110, 116, the court said:

> "The provision of the fourteenth amendment, which went into effect in July, 1868, is, that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' The first question which arises is, whether this corporation was a *person within the jurisdiction* of the State of New York, with reference to the subject of controversy and within the meaning of the amendment."

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, the court said:

> "The fourteenth amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, *to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

In *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 400, the court said:

> "The equal protection clause extends to *foreign corporations within the jurisdiction* of the state and safeguards to them protection of laws applied equally to all in the same situation. Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that *natural persons within its jurisdiction* have a right to demand under like circumstances."

To the same effect are the following:

Kentucky Finance Corp. v. *Paramount Auto Exchange Corp.*, 262 U. S. 544, 550.

National Council of United American Mechanics v. *State Council of Virginia*, 203 U. S. 151, 163.

Atchison, Topeka & Santa Fe Railway Co. v. *Vosburg*, 238 U. S. 56, 59.

12 Corpus Juris 1142.

It is respectfully submitted that the meaning thus applied to the phrase "within its jurisdiction" by these decisions is correct, and that the words were not intended, and should not be construed, to *define or limit the place where* the State must supply the facilities fulfilling equal protection.

If in this case the court will give to the phrase "within its jurisdiction" only the meaning heretofore applied, the result will be to hold that Missouri may not deny to petitioner, *who is a "person within its jurisdiction,"* facilities for legal education equal to those provided for its white citizens. This proposition has never been denied by the state court or by the respondents.

But this court has departed from its settled construction, and has now for the first time construed the phrase "within its jurisdiction" as defining, not merely the *person* to whom equal protection must be accorded, but the *place or territory* within which the facilities implementing equal protection must be used.

The construction formerly applied by the court will not require the State to provide facilities for legal education for petitioner *within the State*, and will only require that the facilities provided for him shall be equal to those provided for white citizens.

We respectfully call attention to the fact that no authority is cited for the construction now adopted. We believe no authority exists.

It is also a fact that the construction applied by the court was not presented or even suggested in petitioner's brief—for which reason it was not discussed in respondents' brief. *So the case is decided upon a question not actually presented.* The gravity of the question is apparent. We respectfully submit that a question so fundamental and of such far-reaching effect should be finally decided by this Honorable Court only after full presentation.

II.

The court overlooks the right of Missouri to enter into a contract with another state to supply the facilities for legal education to Gaines.

The court in its decision overlooks the fact that the Missouri statute (Sec. 9622, R. S. Mo., 1929) authorizes the curators of Lincoln University to contract with the university of an adjacent state to supply Gaines the facilities for a legal education equal to those afforded white students at the University of Missouri. The constitution recognizes that states will contract with each other (Art. I, Sec. 10). Such contract need not be in writing, and may be a mere verbal understanding (*Holmes* v. *Jennison*, 14 Pet. 540, 572). The State of Missouri has the right to enter into a contract with another state, the adjacent State of Illinois, for example, to furnish Gaines the facilities for a legal education, and such a contract is valid even without the consent of Congress. In *Virginia* v. *Tennessee*, 148 U. S. 503, 518, the court said:

"There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that state in that way. If the bordering line of two states should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to to obtain the consent of Congress for the bordering states to agree to unite in draining the district, and thus removing the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of pestilence, without obtaining the consent of Congress, which might not be at the time in session."

To the same effect are *Wharton* v. *Wise*, 153 U. S. 155, 168-170; *Dodge* v. *Briggs*, 27 Fed. 160, 171, and 59 C. J. 36-37.

III.

The court overlooks the relationship of principal and agent which would exist between Missouri and the university of an adjacent state.

The State of Missouri in furnishing the facilities for higher education must necessarily act through some agency. The court in its decision overlooks the fact that

when the curators of Lincoln University carry out the authority in them vested by the Missouri statute (Sec. 9622, R. S. Mo., 1929) and arrange or contract with, let us say, the University of Illinois, for Gaines's attendance at the law school of that institution, and pay said university all it demands for such services, to-wit, the full tuition, the University of Illinois thereby becomes the agent of the State of Missouri to give Gaines the required education. And since Missouri makes this arrangement and pays the full price requested by Illinois therefor, it is *the State of Missouri* that gives Gaines the equal protection, and *not the State of Illinois.* It therefore is erroneous to say, as the opinion states, that "no state can be excused from performance by what another state may do or fail to do." Such a statement would be applicable if Missouri did not enter into the picture (as here), as the principal paying the price to the University of Illinois, which is the agent receiving the fee for services in supplying facilities for legal education.

Contracts of this kind are valid contracts although the performance thereof is to occur outside the territorial boundaries of Missouri (*Virginia* v. *Tennessee,* 148 U. S. 503, 518; *Wharton* v. *Wise,* 153 U. S. 155, 168-170; *Dodge* v. *Briggs,* 27 Fed. 160, 171; 59 Corpus Juris 36-37). And so long as this agency complies with the arrangement which Missouri makes with it for the education of Gaines, there can be no denial to Gaines of the equal protection of the law. The State of Illinois is satisfied with such an arrangement, as indicated by the fact that it receives negro students from other states (R. 87-88); and Gaines cannot raise any objection on its behalf. So long as this arrangement provides Gaines facilities for legal education substantially equal to those provided for

white students, he has not been deprived of any constitutional right and cannot complain.

IV.

The court overlooks its well-established canon of construction of the fourteenth amendment.

With the greatest respect we feel constrained to suggest that in approaching the solution of the problem here involved the court failed to consider and give effect to the well-established canon of construction so clearly and ably stated by the late Justice Holmes speaking for the unanimous court in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110. Justice Holmes there said that—

> "we must be cautious about pressing the broad words of the fourteenth amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power."

The construction of the equal protection clause applied by the court in the case at bar fails to comply with the above canon of construction, which this court has for a long time heretofore observed in measuring state laws with the yardstick contained in the Fourteenth Amendment.

V.

The court overlooks the effect of the failure of Gaines to apply to the curators of Lincoln University.

The court in its decision overlooks the settled rule that no one is entitled to judicial relief until the prescribed administrative remedy has been exhausted. In *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 616-617, this court through Justice Cardozo said:

> "One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. *Lehon* v. *Atlanta*, 242 U. S. 53, 56; *Smith* v. *Cahoon*, 283 U. S. 553, 562. *He should apply and see what happens.*"

In *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50-51, this court through Mr. Justice Brandeis held that the contention of the shipbuilding corporation was—

> "at war with the long-settled rule of judicial administration that *no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.*"

To the same effect are *Petroleum Exploration, Inc.*, v. *Public Service Commission*, 304 U. S. 209, 222-3; *Bourjois, Inc.*, v. *Chapman*, 301 U. S. 183, 188; *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 309; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123; *Gundling* v. *Chicago*, 177 U. S. 183, 186; *Smith* v. *Cahoon*, 283 U. S. 553, 561-2; *Porter* v. *Investors Syndicate*, 286 U. S. 461, 468, 471; *Lehon* v. *City of Atlanta*, 242 U. S. 53, 55-6; *Lieberman* v. *Van De Carr*, 199 U. S. 552, 562, and *Ex parte Virginia Commissioners*, 112 U. S. 177.

The record shows that Gaines deliberately refused to avail himself of the provisions made by the state for his benefit, by refusing to apply to the Lincoln University curators, the agency of the state charged with the furnishing of higher education to its negro citizens (R. 74, 82, 83, 84, 85-86, 218-219, 222). *He even declined under oath to say whether he would have attended a law school in Lincoln University* if one had been established there on a par with the law school at the University of Missouri. This appears at page 88 of the record, as follows:

> "Q. At page 69 of your deposition, do you recall my asking you if a good law school were established at Lincoln University, one that would be on a par with that at Missouri University, whether you would attend it, *and you refused to answer—didn't you?*
> A. *Yes, sir.*"

This attitude on the part of Gaines must leave this court as well as the State of Missouri in the dark as to the good faith of Gaines's application.

We respectfully submit that the court should have decided this question. The mention in the opinion of what the President of Lincoln University wrote Gaines does not answer the point, because the president had no power to act or bind the board of curators. The Board of Curators of Lincoln University alone had the power under the statutes (Sec. 9618, 9622, R. S. Mo., 1929), to provide legal education at Lincoln University. Under the above authorities it was the duty of Gaines to apply to the Lincoln curators, and his failure to do so leaves him in no position to ask judicial relief.

VI.

The far-reaching effect of the court's decision.

The principle of race separation in educational facilities is firmly established in many of the states. It is founded in long-established and deeply-rooted tradition. It is a condition, not a theory.

While maintaining this tradition seven of these states, exercising their police power, in a good faith attempt to solve this difficult problem in a manner to conserve the general welfare of both races, have provided for race separation in higher education, and have enacted laws designed in good faith to give the negro equal facilities for higher education—by out-of-state instruction. (Of these states only Missouri has established a state university for negroes within its borders.) The laws of these seven states are printed in the appendix to petitioner's brief (pages 25-37). Those laws are in actual operation, to the reasonable satisfaction of all fair-minded persons.

So far as Kentucky, Maryland, Oklahoma, Tennessee, Virginia and West Virginia are concerned (each of which has made provision for out-of-state instruction but has no negro university within its borders), the decision means that these states will be compelled either to admit negroes to sit with white boys and girls in their state universities, or to build separate negro universities within their borders to take care of any demand for higher education of negroes which might arise. Because of long-settled and deeply-rooted traditions, and through a well-founded fear of the consequences of any change, it is reasonably certain that those states cannot and will not abolish race separation. So the only choice open to them is either to abolish their state universities and depend upon private

institutions for the education of white students, or to build negro universities within their borders to be ready to supply, immediately on demand, higher education for negroes in every branch of learning taught in the state university—and this too *even though there may never have been any demand* for education in some, or any, of those branches, and even though it cannot reasonably be foreseen that there ever will be such a demand. The dilemma forced upon these states by the opinion is obviously a serious one.

The effect of the decision so far as Missouri is concerned is twofold:

First. The State must at once establish in Lincoln University each and every course of instruction available at the University of Missouri, whether there has ever been any demand therefor by any Missouri negro or not. This because conceivably such a demand may arise; and if it does arise the State must at once be in a position to satisfy it. The result will be a number of new departments in Lincoln University with *idle teaching staffs and empty classrooms.*

Second. If the State should desire to expand the curriculum in the University of Missouri by the addition of new courses of instruction, for which there has arisen a demand from white students but for which there is absolutely no demand from negroes, then the State must at once establish the same courses of study at Lincoln University—again with *idle teaching staffs and no students.* The natural economic result would be to deter the State from the normal expansion of its higher educational institutions.

The problem presented here is intensely practical, and must be solved with due regard for the *actual needs* of the two races, rather than upon the basis of purely theoretical considerations. As stated in the dissenting opinion:

> "The problem presented obviously is a difficult and highly practical one. A fair effort to solve it has been made by offering adequate opportunity for study when sought in good faith. The State should not be unduly hampered through theorization inadequately restrained by experience."

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Supreme Court of Missouri be, upon further consideration, affirmed.

Respectfully submitted,

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FRED L. ENGLISH,
NICK T. CAVE,
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Counsel for Respondents.

Certificate of counsel.

We, the undersigned, counsel for the above-named respondents, do each hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay.

FRED L. WILLIAMS,
FRED L. ENGLISH,
NICK T. CAVE,
WILLIAM S. HOGSETT,
Counsel for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 57.—October Term, 1938.

State of Missouri, at the relation of Lloyd Gaines, Petitioner, vs. S. W. Canada, Registrar of the University of Missouri, and the Curators of the University of Missouri.	On Writ of Certiorari to the Supreme Court of the State of Missouri.

[December 12, 1938.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner Lloyd Gaines, a negro, was refused admission to the School of Law of the State University of Missouri. Asserting that this refusal constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution, petitioner brought this action for mandamus to compel the curators of the University to admit him. On final hearing, an alternative writ was quashed and a peremptory writ was denied by the Circuit Court. The Supreme Court of the State affirmed the judgment. 113 S. W. (2d) 783. We granted certiorari. — U. S. —.

Petitioner is a citizen of Missouri. In August, 1935, he was graduated with the degree of Bachelor of Arts at the Lincoln University, an institution maintained by the State of Missouri for the higher education of negroes. That University has no law school. Upon the filing of his application for admission to the law school of the University of Missouri, the registrar advised him to communicate with the president of Lincoln University and the latter directed petitioner's attention to Section 9622 of the Revised Statutes of Missouri (1929), providing as follows:

"Sec. 9622. *May arrange for attendance at university of any adjacent state—Tuition fees.*—Pending the full development of the Lincoln university, the board of curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the state university of Missouri, and which are not taught at the Lincoln university and

to pay the reasonable tuition fees for such attendance; *provided* that whenever the board of curators deem it advisable they shall have the power to open any necessary school or department. (Laws 1921, p. 86, § 7.)"

Petitioner was advised to apply to the State Superintendent of Schools for aid under that statute. It was admitted on the trial that petitioner's "work and credits at the Lincoln University would qualify him for admission to the School of Law of the University of Missouri if he were found otherwise eligible". He was refused admission upon the ground that it was "contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri". It appears that there are schools of law in connection with the state universities of four adjacent States, Kansas, Nebraska, Iowa and Illinois, where non-resident negroes are admitted.

The clear and definite conclusions of the state court in construing the pertinent state legislation narrow the issue. The action of the curators, who are representatives of the State in the management of the state university (R. S. Mo., Sec. 9625), must be regarded as state action.[1] The state constitution provides that separate free public schools shall be established for the education of children of African descent (Art. XI, Sec. 3), and by statute separate high school facilities are supplied for colored students equal to those provided for white students (R. S. Mo., Secs. 9346-9349). While there is no express constitutional provision requiring that the white and negro races be separated for the purpose of higher education, the state court on a comprehensive review of the state statutes held that it was intended to separate the white and negro races for that purpose also. Referring in particular to Lincoln University, the court deemed it to be clear "that the Legislature intended to bring the Lincoln University up to the standard of the University of Missouri, and give to the whites and negroes an equal opportunity for higher education—the whites at the University of Missouri, and the negroes at Lincoln University". Further, the court concluded that the provisions of Section 9622 (above quoted) to the effect that negro residents "may attend the university of any adjacent State with their tuition paid, pending the full development of Lincoln

[1] Ex parte Virginia, 100 U. S. 313, 346, 347; Neal v. Delaware, 103 U. S. 370, 397; Carter v. Texas, 177 U. S. 442, 447; Norris v. Alabama, 294 U. S. 587, 589.

University", made it evident "that the Legislature did not intend that negroes and whites should attend the same university in this state". In that view it necessarily followed that the curators of the University of Missouri acted in accordance with the policy of the State in denying petitioner admission to its School of Law upon the sole ground of his race.

In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions. *Plessy* v. *Ferguson*, 163 U. S. 537, 544; *McCabe* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, 160; *Gong Lum* v. *Rice*, 275 U. S. 78, 85, 86. Compare *Cumming* v. *Board of Education*, 175 U. S. 528, 544, 545. Respondents' counsel have appropriately emphasized the special solicitude of the State for the higher education of negroes as shown in the establishment of Lincoln University, a state institution well conducted on a plane with the University of Missouri so far as the offered courses are concerned. It is said that Missouri is a pioneer in that field and is the only State in the Union which has established a separate university for negroes on the same basis as the state university for white students. But, commendable as is that action, the fact remains that instruction in law for negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State, and that the State excludes negroes from the advantages of the law school it has established at the University of Missouri.

It is manifest that this discrimination, if not relieved by the provisions we shall presently discuss, would constitute a denial of equal protection. That was the conclusion of the Court of Appeals of Maryland in circumstances substantially similar in that aspect. *University of Maryland* v. *Murray*, 169 Md. 478. It there appeared that the State of Maryland had "undertaken the function of education in the law" but had "omitted students of one race from the only adequate provision made for it, and omitted them solely because of their color"; that if those students were to be offered "equal treatment in the performance of the function, they must, at present, be admitted to the one school provided". *Id.*, p. 489.

A provision for scholarships to enable negroes to attend college outside the State, mainly for the purpose of professional studies, was found to be inadequate (*Id.*, pp. 485, 486) and the question, "whether with aid in any amount it is sufficient to send the negroes outside the State for legal education", the Court of Appeals found it unnecessary to discuss. Accordingly, a writ of mandamus to admit the applicant was issued to the officers and regents of the University of Maryland as the agents of the State entrusted with the conduct of that institution.

The Supreme Court of Missouri in the instant case has distinguished the decision in Maryland upon the grounds—(1) that in Missouri, but not in Maryland, there is "a legislative declaration of a purpose to establish a law school for negroes at Lincoln University whenever necessary or practical"; and (2) that, "pending the establishment of such a school, adequate provision has been made for the legal education of negro students in recognized schools outside of this State". 113 S. W. (2d) p. 791.

As to the first ground, it appears that the policy of establishing a law school at Lincoln University has not yet ripened into an actual establishment, and it cannot be said that a mere declaration of purpose, still unfulfilled, is enough. The provision for legal education at Lincoln is at present entirely lacking. Respondents' counsel urge that if, on the date when petitioner applied for admission to the University of Missouri, he had instead applied to the curators of Lincoln University it would have been their duty to establish a law school, that this "agency of the State", to which he should have applied, was "specifically charged with the mandatory duty to furnish him what he seeks". We do not read the opinion of the Supreme Court as construing the state statute to impose such a "mandatory duty" as the argument seems to assert. The state court quoted the language of Section 9618, R. S. Mo. 1929, set forth in the margin,[2] making it the mandatory duty of

[2] Section 9618, R. S. Mo. 1929, is as follows:

"Sec. 9618. *Board of curators authorized to reorganize.*—The board of curators of the Lincoln university shall be authorized and required to reorganize said institution so that it shall afford to the negro people of the state opportunity for training up to the standard furnished at the state university of Missouri whenever necessary and practicable in their opinion. To this end the board of curators shall be authorized to purchase necessary additional land, erect necessary additional buildings, to provide necessary additional equipment, and to locate, in the county of Cole the respective units of the university where, in their opinion, the various schools will most effectively promote the purposes of this article. (Laws of 1921, p. 86, § 3.)"

the board of curators to establish a law school in Lincoln University "whenever necessary and practicable in their opinion". This qualification of their duty, explicitly stated in the statute, manifestly leaves it to the judgment of the curators to decide when it will be necessary and practicable to establish a law school, and the state court so construed the statute. Emphasizing the discretion of the curators, the court said:

"The statute was enacted in 1921. Since its enactment no negro, not even appellant, has applied to Lincoln University for a law education. This fact demonstrates the wisdom of the legislature in leaving it to the judgment of the board of curators to determine when it would be necessary or practicable to establish a law school for negroes at Lincoln University. Pending that time adequate provision is made for the legal education of negroes in the university of some adjacent State, as heretofore pointed out". 113 S. W. (2d) p. 791.

The state court has not held that it would have been the duty of the curators to establish a law school at Lincoln University for the petitioner on his application. Their duty, as the court defined it, would have been either to supply a law school at Lincoln University as provided in Section 9618 or to furnish him the opportunity to obtain his legal training in another State as provided in Section 9622. Thus the law left the curators free to adopt the latter course. The state court has not ruled or intimated that their failure or refusal to establish a law school for a very few students, still less for one student, would have been an abuse of the discretion with which the curators were entrusted. And, apparently, it was because of that discretion, and of the postponement which its exercise in accordance with the terms of the statute would entail until necessity and practicability appeared, that the state court considered and upheld as adequate the provision for the legal education of negroes, who were citizens of Missouri, in the universities of adjacent States. We may put on one side respondents' contention that there were funds available at Lincoln University for the creation of a law department and the suggestions with respect to the number of instructors who would be needed for that purpose and the cost of supplying them. The president of Lincoln University did not advert to the existence or prospective use of funds for that purpose when he advised petitioner to apply to the State Superintendent of Schools for aid under Section 9622. At best,

the evidence to which argument as to available funds is addressed admits of conflicting inferences, and the decision of the state court did not hinge on any such matter. In the light of its ruling we must regard the question whether the provision for the legal education in other States of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection, as the pivot upon which this case turns.

The state court stresses the advantages that are afforded by the law schools of the adjacent States, Kansas, Nebraska, Iowa and Illinois, which admit non-resident negroes. The court considered that these were schools of high standing where one desiring to practice law in Missouri can get "as sound, comprehensive, valuable legal education" as in the University of Missouri; that the system of education in the former is the same as that in the latter and is designed to give the students a basis for the practice of law in any State where the Anglo-American system of law obtains; that the law school of the University of Missouri does not specialize in Missouri law and that the course of study and the case books used in the five schools are substantially identical. Petitioner insists that for one intending to practice in Missouri there are special advantages in attending a law school there, both in relation to the opportunities for the particular study of Missouri law and for the observation of the local courts,[2] and also in view of the prestige of the Missouri law school among the citizens of the State, his prospective clients. Proceeding with its examination of relative advantages, the state court found that the difference in distances to be traveled afforded no substantial ground of complaint and that there was an adequate appropriation to meet the full tuition fees which petitioner would have to pay.

We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal

[2] See University v. Murray, 169 Md. 478, 486.

training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

The equal protection of the laws is "a pledge of the protection of equal laws". *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system. It seems to be implicit in respondents' argument that if other States did not provide courses for legal education, it would nevertheless be the constitutional duty of Missouri when it supplied such courses for white students to make equivalent provision for negroes. But that plain duty would exist because it rested upon the State independently of the action of other States. We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination but cannot serve to validate it.

Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of negroes as excusing the discrimination in favor of whites. We had occasion to consider a

cognate question in the case of *McCabe* v. *Atchison, Topeka & Santa Fe Railway Co., supra.* There the argument was advanced, in relation to the provision by a carrier of sleeping cars, dining and chair cars, that the limited demand by negroes justified the State in permitting the furnishing of such accommodations exclusively for white persons. We found that argument to be without merit. It made, we said, the constitutional right "depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded". *Id.*, pp. 161, 162.

Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.

It is urged, however, that the provision for tuition outside the State is a temporary one,—that it is intended to operate merely pending the establishment of a law department for negroes at Lincoln University. While in that sense the discrimination may be termed temporary, it may nevertheless continue for an indefinite period by reason of the discretion given to the curators of Lincoln University and the alternative of arranging for tuition in other States, as permitted by the state law as construed by the state court, so long as the curators find it unnecessary and impracticable to provide facilities for the legal instruction of negroes within the State. In that view, we cannot regard the discrimination as excused by what is called its temporary character.

We do not find that the decision of the state court turns on any procedural question. The action was for mandamus, but it does not appear that the remedy would have been deemed inappropriate

if the asserted federal right had been sustained. In that situation the remedy by mandamus was found to be a proper one in *University* v. *Maryland, supra.* In the instant case, the state court did note that petitioner had not applied to the management of Lincoln University for legal training. But, as we have said, the state court did not rule that it would have been the duty of the curators to grant such an application, but on the contrary took the view, as we understand it, that the curators were entitled under the state law to refuse such an application and in its stead to provide for petitioner's tuition in an adjacent State. That conclusion presented the federal question as to the constitutional adequacy of such a provision while equal opportunity for legal training within the State was not furnished, and this federal question the state court entertained and passed upon. We must conclude that in so doing the court denied the federal right which petitioner set up and the question as to the correctness of that decision is before us. We are of the opinion that the ruling was error, and that petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State.

The judgment of the Supreme Court of Missouri is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 57.—October Term, 1938.

State of Missouri, at the relation of Lloyd Gaines, Petitioner,
vs.
S. W. Canada, Registrar of the University of Missouri, and the Curators of the University of Missouri.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

Separate opinion of Mr. Justice McReynolds.

Considering the disclosures of the record, the Supreme Court of Missouri arrived at a tenable conclusion and its judgment should be affirmed. That court well understood the grave difficulties of the situation and rightly refused to upset the settled legislative policy of the State by directing a mandamus.

In *Cumming* v. *Richmond County Board of Education*, 175 U. S. 528, 545, this Court through Mr. Justice Harlan declared—"The education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land." *Gong Lum* v. *Rice*, 275 U. S. 78, 85—opinion by Mr. Chief Justice Taft—asserts: "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear."

For a long time Missouri has acted upon the view that the best interest of her people demands separation of whites and negroes in schools. Under the opinion just announced, I presume she may abandon her law school and thereby disadvantage her white citizens without improving petitioner's opportunities for legal instruction; or she may break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races. Whether by some other course it may be possible for her to avoid condemnation is matter for conjecture.

The State has offered to provide the negro petitioner opportunity for study of the law—if perchance that is the thing really desired—by paying his tuition at some nearby school of good standing. This is far from unmistakable disregard of his rights and in the circumstances is enough to satisfy any reasonable demand for specialized training. It appears that never before has a negro applied for admission to the Law School and none has ever asked that Lincoln University provide legal instruction.

The problem presented obviously is a difficult and highly practical one. A fair effort to solve it has been made by offering adequate opportunity for study when sought in good faith. The State should not be unduly hampered through theorization inadequately restrained by experience.

This proceeding commenced in April, 1936. Petitioner then twenty-four years old asked mandamus to compel his admission to the University in September, 1936, notwithstanding plain legislative inhibition. Mandamus is not a writ of right but is granted only in the court's discretion upon consideration of all the circumstances. *Duncan Townsite Company* v. *Lane, Secretary of the Interior,* 245 U. S. 308, 311; *United States ex rel. Arant* v. *Lane, Secretary of the Interior,* 249 U. S. 367, 371.

The Supreme Court of Missouri did not consider the propriety of granting the writ under the theory of the law now accepted here. That, of course, will be matter open for its consideration upon return of the cause.

Mr. Justice BUTLER concurs in the above views.